IN THE
SUPREME COURT OF MISSOURI

No. SC84816

BUCHHOLZ MORTUARIES, INC.

Respondent (Petitioner below),

v.

DIRECTOR OF REVENUE,
STATE OF MISSOURI,

Appellant (Respondent below).

Petition for Review
From The Administrative Hearing Commission,
The Honorable Karen A. Winn, Commissioner

Appellant's Reply Brief

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Argument

Buchholz and the Director agree upon the test to be applied in determining whether caskets and burial containers are fixtures – the three-part test articulated in *Marsh v. Spradling*, 537 S.W.2d 402, 405 (Mo. 1976). More particularly, courts look at annexation, adaption and intent. *Id.* Obviously, however, we differ in what the facts show when subjected to that test.

Annexation

Buchholz argues that caskets and burial containers - as a "system" - are "fully integrated into the real estate with the intent that *it* never leave" (Resp. Br. at 18) (emphasis supplied). But Buchholz's own brief shows that, at the very least, that the caskets are not integrated with the real estate and, in fact, the burial containers are used to prevent integration with the real estate and to preserve the integrity of the remains as long as possible. As Buchholz notes, burial containers "retard the decomposition of the casket by preventing soil and water from making contact with the casket" (Resp. Br. at 9). Buchholz may not have it both ways; the container may not at the same time protect the remains and casket and prevent incursion by earth and water, and, at the same time, provide evidence of annexation.

Buchholz cites *Sears, Roebuck & Co. v. Seven Palms Motor Inn,* 530 S.W.2d 695, 697 (Mo. banc 1975) in support of its theory that caskets and containers are both "components of an integrated burial system" (Resp. Br. at 18, note 4). In *Sears, Roebuck*, a case involving a mechanic's lien, drapes were at issue. *Id*. at 696. The drapes were custom-made for the Seven

Palms Motor Inn, and Sears also furnished traverse rods and curtain rods from which drapes would hang. *Id.* at 696-697. The drapes were to allow motel guests to control light into the room or maintain privacy. *Id.* at 697. Given these facts, this Court held that the traverse rods alone

> did not accomplish this purpose. To serve this purpose, it was essential that the drapes be provided and attached to the rod. They were provided and attached, and became an integral part of the instrument designed for use in connection with the window in the guest's room. As such, the drapes were as much a fixture as the traverse rod itself.

Id. at 697.

In contrast, caskets merely rest inside containers. Though many cemeteries require the use of containers, they are not required by law (Tr. 28). Sears' drapes, without the traverse rods from which they were to hang, cannot block the sun or protect a guest's privacy; caskets, on the other hand, can hold remains and be buried without burial containers.

Buchholz also argues that because caskets and burial containers are really heavy, they are annexed to the earth. Buchholz wonders, "[h]ow else can something be attached to dirt?" and suggests that "Under the Director's logic, drain pipes, watering systems, trees, fence posts and the like, which are merely buried in the ground would not be fixtures" (Resp. Br. at 18-19). Buchholz's argument shows the flaws in its logic, not the Director's. Drain pipes are connected to other things - buildings and other pipes, with the terminus being at the drainage

site. Likewise for watering systems. Trees are far more than "merely buried in the ground" – they develop root systems that keep them there. So, too, fence posts are just a small part of a larger structure, *i.e,* a completed fence.

Adaptation

Buchholz, not surprisingly, relies upon the commission's holding that caskets and containers are fixtures because "a cemetery is designed as a place for digging graves, graves for receiving caskets, and caskets for holding dead bodies" (Resp. Br. at 21), and argues that caskets and burial containers fulfill the adaptation element because cemeteries are "specifically 'devoted' to the burial of human remains" (Resp. Br. at 22, *quoting Sears, Roebuck & Co. v. Seven Palms Motor Inn*, 530 S.W.2d 695, 696 (Mo. banc 1975)). As the Director pointed out in her opening brief, however, it would be difficult to find a test that is more malleable; what is not created for the purpose to which it will be put? That said, Buchholz argues that under the Director's reasoning, standard size items like PVC piping and ceiling lights and fans are not adapted. Perhaps; perhaps not. But Buchholz oversimplifies insofar as for items "thought of as fixtures" (Resp. Br. at 22), it is a three-part, not a one-part test.

Intent

Buchholz contends that its hoped-for result in this Court could not be more obvious: "Although the conclusion is self-evident from the purpose of burial arrangements, the method of installation and burial erases any doubt of the parties' intent to permanently affix the casket and container to the real estate" (Resp. Br. at 23). Yet it was not so obvious or self-evident to

Buchholz at all when they paid - unquestioningly - the sales tax on the caskets and containers at issue here. Only after approached by an "outside advisor" did Buchholz suddenly come to the "self-evident" conclusion that maybe it should not have paid that tax in the first place.

True, sole reliance on Buchholz's payment of tax, or the payment of any tax by a taxpayer, as exclusive evidence of intent would effectively eliminate refund claims altogether (Resp.Br. 25), and the Director acknowledged this in her opening brief (App. Br. 17). But to ignore that fact entirely, as Buchholz would have this Court do, is to ignore the reality of the situation. If caskets and burial containers are so obviously and indisputably fixtures, why did it take so long for someone - outside of Buchholz, no less - to reach that conclusion?

Title is distinct from ownership

Extrapolating from two government contract cases cited by the Director (*Olin Corp. v. Director of Revenue,* 945 S.W.2d 442 (Mo. 1977) and *Thompson-Stearns-Rogers v. Director of Revenue,* 489 S.W.2d 207 (Mo. 1973)), Buchholz makes the sweeping pronouncement that, "It seems doubtful that any distinction between title and ownership pertains outside the unusual governmental contract scenario" (Resp. Br. at 32). Because ownership does not aid its argument, Buchholz effectively attempts to read the word right out of the statute defining "sale at retail." But this Buchholz may not do.

It is axiomatic that meaning must be given to each word in a statute. *Hadlock v. Director of Revenue*, 860 S.W.2d 335, 337 (Mo. banc 1993); *Gott v. Director of Revenue*, 5 S.W.3d 155, 158 (Mo. banc 1999); *see also, Hoffman v. Van Pak Corp*., 16 S.W.3d 684, 689 (Mo.App., E.D. 2000) ("We presume that the legislature did not insert idle verbiage or

superfluous language in the statute."). Likewise, a word in a statute may not be considered a needless repetition of another. *Tuft v. City of St. Louis*, 936 S.W.2d 113, 117 (Mo.App., E.D. 1996). Buchholz, however, asks this Court to read "title" and "ownership," as they appear in § 144.010.1(10), RSMo 2000, as identical, except maybe in the "unusual" governmental contract arena. Obviously, such a result is untenable. "Title" and "ownership" must each be given individual meaning; just because the distinction may not matter in the "usual" circumstances does not mean Buchholz may dispense with it all together, nor does it mean that it does not apply in this arguably "unusual" case of first impression.

Conclusion

In view of the foregoing, the Director submits that this Court should reverse the decision of the Administrative Hearing Commission awarding a refund to Buchholz in the amount of $101,565.17 and reinstate the Director's determination denying the refund request.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this _____ day of March, 2003, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 1,385 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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Associate Solicitor